

To (Migration) [2019] AATA 6392 (1 November 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kai Yin To
CASE NUMBER:	1814420
DIBP REFERENCE(S):	BCC2017/3430120
MEMBER:	Rosa Gagliardi
DATE:	1 November 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Statement made on 01 November 2019 at 12:02pm

CATCHWORDS

MIGRATION – Working Holiday (Temporary) (Class TZ) visa – Subclass 417 (Working Holiday) – incorrect answer in application – specified work in regional Australia – employer reported no record of applicant – applicant left Australia – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2 cl 417.221; Schedule 4 Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 April 2018 to refuse to grant the applicant a Working Holiday (Temporary) (Class TZ) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 20 September 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.cl.417.221 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because it was found that the applicant has provided false and misleading information in contravention of Public Interest Criterion (PIC) 4020(1).
6. On 23 August 2019 the Tribunal wrote to the applicant at an address provided by him for the purposes of the review advising that it appeared that he had been offshore since 24 September 2018. The Tribunal explained that it would be happy to hold a telephone hearing if needed and asked the applicant to indicate if he wished to appear by phone and requested he respond to the Tribunal by 6 September 2019. As at the time of writing this decision, the Tribunal has not received a response from the applicant. In the circumstances the Tribunal proceeds to decision on the basis of the information before it.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.417.221 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The Tribunal notes that the Department wrote to the applicant on 23 October 2017 to advise that the Department had conducted investigations to confirm the information provided in his application but that it appeared that he had provided false and misleading information in that application. The applicant was provided with 28 days to respond to the information. The applicant did not respond to the Departmental letter.
14. The applicant applied for a Working Holiday (subclass 417) visa on 20 September 2017. The applicant had previously held a Working Holiday visa granted on 29 July 2016, and this review is in respect of his second application for such a visa. The applicant is required to meet the criteria in cl.417.211, including:
 15. *If the applicant is, or has previously been, in Australia as the holder of a working holiday visa, the Minister is satisfied that the applicant has carried out specified work in regional Australia for a total period of at least 3 months as the holder of that visa.*
16. Therefore specified work undertaken by the applicant is a material particular in regards to the grant of the visa.
17. In his application filed on 20 September 2017 the applicant declared that he had undertaken specified work in the Agriculture industry with employer, FARM WORKFORCE PTY LTD, (ABN: 55 615 414 901) from 6 January 2017 to 20 April 2017 in the 2640 regional postcode.
18. For the purpose of the application specified work is defined as plant and animal cultivation, fishing and pearling, tree farming and felling, mining and construction in Legislative Instrument: IMMI17/018.

19. When the Department inquired with the employer, FARM WORKFORCE PTY LTD, (ABN: 55 615 414 901), it was found that the employer verified that the applicant had *not* completed specified work with them.
20. The Department considered, therefore, that it had evidence suggesting that the information provided in support of the specified work undertaken by the applicant may have been false or misleading in a material particular, in relation to the application.
21. **Consideration of the evidence**
22. The applicant applied for the Working Holiday visa (subclass 417) on the basis that:
 - He had undertaken as the holder of a working holiday visa, specified work in regional Australia for a total period of at least 3 months as the holder of that visa. That is, that he had worked for FARM WORKFORCE PTY LTD, (ABN: 55 615 414 901) from 6 January 2017 to 20 April 2017 in the 2640 regional postcode.
23. Departmental inquiries with the employer indicated that the applicant had not worked for FARM WORKFORCE PTY LTD, (ABN: 55 615 414 901) from 6 January 2017 to 20 April 2017 in the 2640 regional postcode, as claimed by the applicant.
24. The Tribunal accepts the evidence provided by FARM WORKFORCE PTY LTD as credible, being that the applicant did not work for them for the claimed period, because the company would have no reason to be untruthful about the matter to the Department, whereas it was in the applicant's interest to provide false and misleading information to the Department to obtain a second Working Holiday visa (subclass 417).
25. Furthermore, the Tribunal has little information before it that the applicant has disputed FARM WORKFORCE's PTY LTD disavowal of the applicant having worked for the company to either the Department or the Tribunal. Nor did he avail himself of the opportunity to do so at a hearing.
26. Based on the evidence before it, the Tribunal is therefore satisfied that the information submitted to the Department on 20 September 2017 is false and misleading in a material particular, as defined in PIC 4020(5). Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

27. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
28. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
29. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

30. In the first instance, the Tribunal has given consideration to whether the applicant has raised any compelling circumstances that affect the interests of Australia that justify the grant of the visa. At the time of consideration by the Department the applicant had not submitted any compelling circumstances in this regard. This is a matter that the Tribunal would have asked the applicant about had he availed himself of a hearing. Given the Tribunal has limited evidence that the grant of the visa is justified because the grant of the visa affects the interests of Australia as a whole, the Tribunal is not satisfied that this is the case, and is not satisfied that the requirements should be waived on the basis of the evidence before it.
31. Secondly, in terms of whether there are compassionate or compelling circumstances that affect the interests of an Australia citizen, an Australian permanent resident or an eligible New Zealand citizen, the applicant did not submit any information to the Department that would indicate that this is the case. The Tribunal also has little information before it indicating that there are compassionate or compelling circumstances that affect the interests of an Australia citizen, an Australian permanent resident or an eligible New Zealand citizen. These were matters that the Tribunal would have readily probed with the applicant had he sought to make submissions and had attended a hearing.
32. On the basis of the information before it, therefore, the Tribunal is not satisfied that the requirements of PIC 4020(1) ought to be waived.

33. **Conclusion**

34. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.417.221.

DECISION

35. The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Rosa Gagliardi
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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